2/23/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Chem-Met Services, Inc.,	)	**Docket No. RCRA-V-W-011-92**
	)	
Respondent	)	

ORDER DENYING MOTION TO DISMISS AND/OR FOR ACCELERATED DECISION

The complaint in this matter, filed on January 31, 1992, pursuant to section 3008(a) of the Resource, Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928, charged Respondent, Chem-Met Services, Inc. (Chem-Met) with violations of the Act and applicable regulations, 40 CFR Part 268. Specifically, it was alleged that Chem-Met, identified as a person owning and operating a facility which generates, transports, treats and stores hazardous waste, during the period November 7, 1988, through April 15, 1989, sent 361 manifested shipments of hazardous waste to Envirosafe Services of Ohio, Inc., that at least three of these shipments (identified as Nos. 16351, 16354 and 16444) although certified as being in compliance with applicable performance standards specified in 40 CFR Part 268, Subpart D and in conformance with the prohibitions in section 3004(d) of the Act and 40 CFR § 268.32, were rejected by Envirosafe and returned to Chem-Met, because the waste exceeded F006 treatment standards for nickel and/or lead. Four other shipments to Envirosafe in July and August 1990, were also

allegedly rejected for failure to meet applicable treatment standards.[1/]

The complaint further alleged that on August 22, 1990, Chem-Met received K086 waste from Tri-State Steel Drum Company, Inc., that analysis of a sample of K086 treated waste submitted for testing on September 1990, indicated that the waste failed to meet treatment standards in 40 CFR § 268.41 in that it exceeded the concentration for chromium and that between August 22, 1990, when Chem-Met received the K086 waste from Tri-State and September 19, 1990, when a sample of K086 was submitted for analysis, Chem-Met made 203 manifested waste shipments to land disposal facilities. These shipments are referred to as K086 shipments and based on Chem-Met's responses to section 3007 information requests, are allegedly cumulative of all wastes received prior to the date submitted for analysis. Accordingly, it is alleged that analytical results from the September 19 sample submitted are representative of all of the mentioned shipments and that each of these shipments failed to comply with land disposal restrictions (LDR) for K086. Because each of 203 shipments of K086 waste failed to comply with LDR as to chromium and three other shipments exceeded LDR for nickel and/or lead, Chem-Met allegedly failed to determine whether its wastes were restricted from land disposal, in violation of 40

[1/] The complaint acknowledged that the violations represented by these shipments were included in a Consent Judgment entered in Wayne County Circuit Court on September 3, 1991, Frank J. Kelley, Attorney General of the State of Michigan, ex rel., Michigan Natural Resources Comm., et al. v. Chem-Met Services, Inc.

CFR § 268.7(a), on at least 206 occasions. Additionally, for Shipment Nos. 16351, 16354 and 16444 (F006 wastes), Chem-Met allegedly violated 40 CFR §§ 268.7(b)(1) and 268.40(a) by failing to adequately test treatment residues, or on extract of such residues, to assure that the treatment residues or an extract thereof met applicable treatment standards. Also for the 206 identified shipments, Chem-Met was alleged to have sent treated waste which did not meet applicable standards to a disposal facility while providing certification that the waste or treatment residue had been treated in compliance with applicable standards, thereby violating 40 CFR § 268.7(b)(5) on 206 occasions. For these alleged violations, it was proposed to assess Chem-Met a penalty totaling $1,122,733.

Chem-Met answered, admitting that it had obtained a Hazardous Waste Disposal Facility Operating License on June 8, 1982, under the Michigan Hazardous Waste Management Act, alleging that the Consent Judgment, supra note 1, settled all claims for alleged violations of land disposal restrictions resulting from shipments from Chem-Met's facility prior to September 3, 1991, and denied that the wastes involved were hazardous based on the decision in Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991).

Chem-Met admitted that shipments identified as Nos. 16351, 16354 and 16444 were rejected by Envirosafe and returned to Chem-Met, but denied that these shipments were not covered by the Consent Judgment, contending that the Consent Judgment settled all claims for alleged violations of land disposal restrictions

resulting from shipments prior to September 3, 1991. Additionally, Chem-Met asserted that 40 CFR § 268.7(a) does not apply to treatment facilities which ship wastes to disposal facilities, that it did not violate section 268.7(a)(1) because it properly analyzed its waste in accordance with its waste analysis plan and that the certification required by section 268.7(b)(5)(i) only requires a [good faith] belief that the treatment process has been operated and maintained properly so as to comply with specified performance levels, i.e., Part 268, without impermissible dilution of the wastes. In any event, Chem-Met contended that it did not violate section 268.40(a), because the cited regulation only prohibits land disposal of certain wastes, not shipment of waste and subsequent rejection. The wastes were allegedly reprocessed prior to land disposal and were not hazardous under the decision in Shell Oil Co., supra.

Chem-Met alleged that the K086 waste referred to in the complaint consisted of a single 55-gallon drum which was accepted by a Chem-Met employee contrary to the firm's policy. While acknowledging that it submitted a single grab sample of approximately eight ounces of treatment residue for analysis on September 19, 1990, Chem-Met averred it was not possible to conclude that the sample contained K086 waste, because the single drum of that waste had been processed the day it was received, more than 27 days earlier. Moreover, Chem-Met denied that analysis of the mentioned sample failed treatment standards for chromium, alleging that the analysis showed that the waste did not exhibit a

regulated waste characteristic. Once more Chem-Met stated that the mentioned waste was not hazardous under the decision in Shell Oil Co., supra.

Chem-Met corrected statements in response to EPA information requests to the effect that wastes received prior to any sample analysis date are cumulative of wastes received to that date, asserting, inter alia, that it would be physically impossible for waste received on a given date to remain within the system for more than the time it takes to process the waste and that the implication in its response that any other treated waste product, other than one 20-yard roll-off box processed and shipped on August 22, 1990, was impacted by single 55-gallon drum is a physical and chemical impossibility (letter, dated March 12, 1992, Exh B to answer). Chem-Met reiterated its contention that 40 CFR § 268.7(a) does not apply to treatment facilities which ship waste to disposal facilities, denied that it had failed to adequately test its treatment residues and alleged that it had followed its waste analysis plan. Chem-Met moved that the complaint be dismissed and requested a hearing.

Chem-Met's Motion To Dismiss And/Or For Accelerated Decision

Under date of November 13, 1992, Chem-Met served a Motion to Dismiss and/or for an Accelerated Decision in its favor. Chem-Met contended that the complaint failed to allege a violation of RCRA, because the shipments involved in the alleged violations were treatment residues derived from one or more hazardous wastes which

were not subject to regulation based on the decision in Shell Oil Co., supra. Even if Shell Oil Co. were not dispositive, Chem-Met asserted that the complaint failed to allege a violation of RCRA land disposal restrictions (LDR). In any event, Chem-Met argued that the instant action was barred by principles of res judicata and estoppel because of the Consent Judgment (supra note 1). In an accompanying legal memorandum in support of the motion, Chem-Met repeated many of the arguments detailed above from its answer.

Complainant's Motion In Opposition

On November 30, 1992, Complainant filed a "Motion In Opposition To Respondent's Motion to Dismiss" (Opposition). Firstly, Complainant says that irrespective of whether the federal "mixture" and "derived from" rules are retroactively invalid [under Shell Oil Co], EPA may enforce Michigan's "mixture" and "derived from" rules in the instant case, because Michigan had an authorized hazardous waste program at the time of the alleged violations. Citing 40 CFR § 271.1(i)(2), Complainant asserts that EPA may enforce Michigan's "mixture" and "derived from" rules which are more stringent, but not greater in scope than the federal rules. Complainant argues that the Michigan "mixture" and "derived from" rules do not expand the scope of the regulated community beyond that of the federal program and have a direct counterpart in the federal program.[2/] According to Complainant, the direct state

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[2/] Complainant cites unpublished internal Agency memoranda for the proposition that EPA has traditionally interpreted RCRA § 3009 (continued...)

program counterpart to the federal program is the original listing of the waste as hazardous (Opposition at 4). It is argued that in the absence of the federal "mixture" and "derived from" rules, the [similar] state rules simply clarify the procedures that determine when the same waste ceases to be regulated under RCRA.

Although emphasizing that the complaint alleges violations of LDR, Complainant, nevertheless says that with respect to alleged failures to meet treatment standards for F006 waste, it intends to withdraw allegations of violations of 40 CFR §§ 268.7(a), 268.7(b)(1), 268.7(b)(5) and 268.40(a) (Opposition at 4). Regarding K086 wastes, Complainant says that it intends to withdraw its allegation that all of the 203 shipments to Envirosafe between August 22, 1990, and September 19, 1990, failed to meet treatment standards for K086 (Opposition at 5). Complainant stated it was reviewing information submitted by Chem-Met to determine the number of these shipments which failed to meet treatment standards for K086.

[2/](...continued)
as authorizing the Agency to enforce state regulations which are "more stringent" than the federal program and that the Agency distinguishes between state regulations which are "more stringent" and those which are "broader in scope" than the federal program. EPA uses two criteria in making this distinction: "(1) whether the state requirement increases the size of the regulated community beyond that of the federal program and if a requirement does not increase the size of the regulated community, (2) whether the state requirement has a direct counterpart in the federal program." Determining Whether State Hazardous Waste Management Requirements are Broader in Scope or More Stringent than the Federal RCRA Program, May 21, 1984 (PIG-84-1) and EPA Enforcement of RCRA-Authorized State Hazardous Waste Laws and Regulations, March 15, 1982.

Complainant further stated it intended to withdraw the allegation of violations of 40 CFR § 268.7(a) as to K086 waste. As to section 268.7(b)(5), Complainant acknowledged that the required certification accompanied each shipment of K086 wastes. Complainant further acknowledged that the cited regulation does not impose strict liability. Complainant alleges, however, that Chem-Met's system was consistently unable to treat wastes to the standards applicable to K086, and argues that even a standard of good faith would require the authorized representative to be aware of the types of waste treated in its system and the ability of that system to treat wastes to the appropriate standard.

Acknowledging that it was bound by the Consent Judgment, Complainant asserts that the judgment resolved all violations of RCRA and cited Michigan statutes raised in plaintiff's complaint and those cited by MDNR prior to entry of the Consent Judgment. Because the violations alleged in the instant action were not contained in the complaint in the Wayne County Circuit Court action nor previously cited by MDNR, Complainant says that the Consent Judgment is no bar to this action.

Complainant's Motion To Amend The Complaint

On December 15, 1992, Complainant filed a Motion for Leave to File an Amended Complaint, Findings of Violation and Compliance Order (amended complaint). As did the initial complaint, the proposed amended complaint pointed out that Michigan had been granted final authorization to administer its hazardous waste

program in lieu of the federal program (51 Fed. Reg. 36804, October 30, 1986). With respect to requirements promulgated pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA), the amended complaint stated that EPA was authorized to carry out and enforce such requirements until such time as a state was authorized to do so. Acknowledging that the LDR program (40 CFR Part 268) was promulgated pursuant to HSWA and that EPA retained authority to enforce such matters, except for solvent and dioxin wastes prohibited under section 3004(c) and California List Wastes prohibited under section 3004(d) for which the State of Michigan was authorized, the amended complaint stated that it sought to enforce federal or state regulations as applicable. Nevertheless, the amended complaint refers only to Part 268 regulations.

The proposed amended complaint referred to the drum of K086 hazardous waste received by Chem-Met from Tri-State on August 22, 1990, and alleged that Chem-Met's waste analysis plan provided, inter alia, that the generator/treater must provide a certified lab analysis demonstrating that the mixed waste stream, after treatment, has met the toxicity characteristic leaching procedure (TCLP) or concentration treatment standards. Additionally, it is alleged that Chem-Met's waste analysis plan provides that any time significant changes are proposed in the character of the waste stream, the treater must repeat the qualification treatability tests on the mixed stream and furnish the analytical results to Envirosafe (ESI).

It is alleged that when Respondent processed the K086 waste, a new waste stream was created, which had more stringent land disposal restriction requirements than the F006 waste stream then being processed. Chem-Met allegedly failed to follow its waste analysis plan by failing to notify the land disposal facility that the waste stream had changed and failing to perform qualification treatability tests on the new waste stream to determine if applicable treatment standards were being met. For the K086 shipments, Chem-Met allegedly failed to test the waste in accordance with the frequency specified in its waste analysis plan as required by 40 CFR § 268.7(b), and failed to list the EPA hazardous waste number and treatment on notices for these shipments as required by section 268.7(b)(4). These failures allegedly occurred on seven shipments. For these alleged violations it is proposed to assess Chem-Met a penalty of $73,808.

Chem-Met has not responded to the motion to amend, because it has moved for and been granted an extension in which to do so until 15 days after the ALJ rules on its motion to dismiss.

Chem-Met's Reply To Complainant's Opposition

Although the Rules of Practice make no provision for replies to responses to motions, Chem-Met served a Reply to Complainant's Motion in Opposition to Respondent's Motion to Dismiss on

December 16, 1992.[3/] Because the federal land disposal restrictions applicable to K086 wastes were not adopted by the State of Michigan at any time relevant to the complaint, Chem-Met says that there is no state law for EPA to enforce (Reply at 2, 3). According to Chem-Met, in August and September 1990, the time of the alleged K086 shipments, Michigan had only incorporated into its regulations, the CFR of July 1, 1987, as amended July 7, 1987 (52 Fed. Reg. 25760). The only exception is the California list prohibitions which prohibit the land disposal of liquid wastes and are allegedly irrelevant to the solid treatment residue from Chem-Met's facility.

Although questioning EPA's reliance on internal Agency memoranda, Chem-Met asserts that application of the criteria set forth therein (supra note 2) shows that the regulated community is increased by the state rules and that even if this were not true, there was no federal counterpart in existence at the time of the alleged violations because of the decision in Shell Oil. Accordingly, Chem-Met argues that EPA may not enforce Michigan's "mixture" and "derived from" rules (Reply at 4, 5). Chem-Met says that EPA cannot seriously advance the argument that the federal counterpart to the state "mixture" and "derived from" rules is the

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[3/] The EAB has indicated that, absent an advance motion for leave to file, replies to responses to motions, not being provided for in the rules, will normally be struck. Hardin County, Ohio, RCRA (3008) Appeal No. 92-1 (Order Denying Reconsideration, February 4, 1993). Because this rule may not generally be understood and because of the complexity of the matters at issue, Chem-Met's reply is being considered.

original listing of the waste as hazardous, because to do so ignores the fact that the reason the federal rules were invalidated by the Court in Shell Oil was the lack of notice to the regulated community that such wastes were to be regulated (Reply at 5, 6).

Reiterating its contention that EPA cannot establish violations of the land disposal restrictions, Chem-Met points out that Complainant has acknowledged that a certification accompanied each of the shipments of K086 waste and that the standard is not strict liability but one of good faith (Reply at 6). Alleging that it did not knowingly accept K086 wastes for treatment, Chem-Met emphasizes that there is no allegation, let alone proof, that Chem-Met was aware that its system was incapable of treating K086 or, indeed, that K086 was being introduced into its system. In the absence of such evidence, Chem-Met argues that EPA cannot establish a violation of the good faith standard and a violation of the regulation as to K086 shipments.

Lastly, Chem-Met alleges that Complainant, both expressly and tacitly, has conceded the dispositive nature of the Consent Judgment (Reply at 7). Chem-Met says EPA expressly conceded that it was bound by the Consent Judgment and, by withdrawing the allegations of violations with respect to F006 waste, the Agency, according to Chem-Met, tacitly concedes that the Consent Judgment applies to all alleged land disposal violations.

D I S C U S S I O N

Although both the initial and proposed amended complaints state that federal and state regulations are being enforced "as applicable" and although the standards of pleading in administrative actions may be lax, neither of the mentioned complaints cite or refer to any state regulations as being violated and it is concluded that the only violations alleged are of federal regulations.[4/] This conclusion is supported, if not compelled, by the fact LDR regulations were promulgated pursuant to HSWA and there is no allegation or evidence that Michigan has been authorized to carry out or enforce HSWA or that any of the exceptions thereto, i.e., California list prohibitions or solvent and dioxin wastes, apply.[5/]

[4/] Section 22.14(a) of the Rules of Practice (40 CFR Part 22) provides that each complaint for the assessment of a civil penalty shall include, inter alia, "(2) [s]pecific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated; . . . ."

[5/] Complainant acknowledges that the restrictions on the land disposal of K086 were not effective until August 8, 1990. See 40 CFR § 268.33(c) and (d) (1991). If Chem-Met's analysis of Michigan law (ante at 11) is accurate, Michigan, in August and September 1990, had only adopted the CFR in effect as of July 1, 1987, as amended July 7, 1987 (52 Fed. Reg. 25760). This is an additional reason why Complainant would gain nothing, even if the complaint were to be construed as enforcing Michigan law.

K086 waste is listed as a hazardous waste from specific sources in 40 CFR § 261.32 and described as follows:

> Solvent washes and sludges, caustic washes and sludges, or water washes and sludges from cleaning tubs and equipment used in the formulation of ink from pigments, driers, soaps, and stabilizers containing chromium and lead.

The heading to section 261.32 provides that:

> The following solid wastes are listed hazardous wastes from specific sources unless they are excluded under §§ 260.20 and 260.22 and listed in appendix IX.

The heading to section 261.32 to the effect that wastes therein identified are hazardous and remain so unless excluded under sections 260.20 and 260.22 is reinforced by section 261.3 "Definition of hazardous waste" and in particular by section 261.3(c), which provides that unless and until it meets the criteria of paragraph (d) of this section, a hazardous waste will remain a hazardous waste. Section 261.3(c)(2)(i), the "derived from" rule, provides that any solid waste generated from the treatment, storage or disposal of hazardous waste is a hazardous waste.[6/] Paragraph (d) of section 261.3, referred to above,

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[6/] Section 261.3(c)(2)(i) provides:

> (2)(i) Except as otherwise provided in paragraph (c)(2)(ii) of this section, any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust, or leachate (but not including precipitation run-off) is a hazardous waste. (However, materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under this provision unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.)

provides essentially that any solid waste described in paragraph (c) of this section is not a hazardous waste if it is listed in Subpart D, contains a waste listed under Subpart D or is derived from a waste listed in Subpart D and it has been excluded from paragraph (c) of this section under sections 260.20 and 260.22.[7/]

From the foregoing, it can be argued that the K086 waste at issue here, being listed in Subpart D (section 261.32) and not having been excluded under sections 260.20 and 260.22 was hazardous waste, and that invalidation of the "derived from" rule does not affect this result.[8/] The invalidated "mixture" and "derived from"

[7/] Section 261.3(d) provides:

> (d) Any solid waste described in paragraph (c) of this section is not a hazardous waste if it meets the following criteria:
>
> (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in Subpart C.
>
> (2) In the case of a waste which is a listed waste under Subpart D, contains a waste listed under Subpart D or is derived from a waste listed in Subpart D, it also has been excluded from paragraph (c) under §§ 260.20 and 260.22 of this chapter.

[8/] Although Chem-Met has not so contended, it might be argued that K086 was listed in section 261.32 solely because of toxicity for chromium and lead and if it were shown that the treated residues were mixed with, or the result of mixing with, other solid non-hazardous waste and did not exceed concentrations for lead and chromium specified in section 261.24, the treated residues would be within an exception to the mixture rule provided by section 261.3(a)(2)(iii). Section 261.3(a)(2)(iii) provides:

> (iii) It is a mixture of a solid waste and a hazardous waste that is listed in subpart D of this part solely because it exhibits one or more of the characteristics of hazardous waste identified in subpart

(continued...)

rules were reinstated (57 Fed. Reg. 7628, March 3, 1992) and in the preamble to the reinstatement, the Agency acknowledged that some "mixture" and "derived from" rule wastes would be covered by existing regulations [absent the reinstatement].[9/] LDR being

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[8/](...continued)
C, unless the resultant mixture no longer exhibits any characteristic of hazardous waste identified in subpart C of this part or unless the solid waste is excluded from regulation under § 261.4(b)(7) and the resultant mixture no longer exhibits any characteristic of hazardous waste identified in subpart C of this part for which the hazardous waste listed in supart D of this part was listed.

[9/] The preamble (57 Fed. Reg. 7629) provides in pertinent part:

> The Agency acknowledges that some "mixture" and "derived-from" wastes would still be covered under existing regulations. An interpretation of the regulations under which the slightest mixing or management rendered a listed waste non-hazardous would clearly be unreasonable. Nevertheless, if the rules were no longer in effect, the possibility of confusion and erroneous waste classifications would surely increase, resulting in greater potential for harm to human health and the environment.
>
> For example, if the "mixture" and "derived-from" rules were not in effect, some wastes might be mistakenly classified as non-hazardous and disposed of in a municipal landfill or unregulated industrial landfill. EPA could find it extremely difficult to track these disposals, so that any environmental problems they caused might be exacerbated by delay and could ultimately require more costly cleanups. It is true that the current land disposal restrictions (LDR) program would require treatment and tracking of certain mixed and derived-from wastes, since the LDR restrictions apply at the point of a waste's generation (see 55 FR at 22651-52, June 1, 1990). Likewise, the prohibition on dilution as a substitute for adequate treatment likewise normally applies at the point of generation (see 40 CFR 268.3(a)). As a result, those wastes restricted from land disposal which clearly meet the listing description at the point

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applicable at the point of generation (supra note 9), invalidation of the "derived from" rule does not as a matter of law relieve Chem-Met of liability for the violations at issue here. Moreover, because Complainant has alleged and Chem-Met has denied that the residue of K086 submitted for analysis on September 19, 1990, failed treatment standards for chromium, there appears to be a factual issue in this respect. Also, Chem-Met contends that a "good faith" standard applies to its certification of K086 shipments and, even though it accepted K086 in the past, now asserts that it was unaware its system was incapable of treating K086 or, despite apparent acceptance of a manifest and drum labeled K086, that it was unaware K086 was being introduced into its system. Whether these contentions are reasonable under all the circumstances are factual matters appropriate for a hearing.

Examination of the complaint leading to the Consent Judgment in Wayne County Circuit Court (C's Exh 7) reflects that it refers to F006 wastes, but is silent as to K086. Accordingly, it is not self-evident that the Consent Judgment includes alleged violations relating to K086 wastes and, being in the nature of an affirmative defense, the burden is on Chem-Met to demonstrate that the Consent

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[9/](...continued)
of generation would still be subject to the treatment standards of RCRA at 40 CFR part 268 (as well as the waste analysis, tracking and recordkeeping requirements associated with that program) even if the wastes were later mixed with other wastes, or, in some cases, even if subsequently managed (see 55 FR 22661).

Judgment included, or was intended to include, such violations. This would involve factual matters appropriate for a hearing.

O R D E R

Chem-Met's Motion to Dismiss and/or For Accelerated Decision is denied. Chem-Met will respond to the Motion to Amend Complaint within 15 days after service of this order.

Dated this 23rd day of February 1993.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION TO DISMISS AND/OR FOR ACCELERATED DECISION,** dated February 23, 1993, in re: Chem-Met Services, Inc., Dkt. No. RCRA-V-W-011-92, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: February 23, 1993

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